IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAM MELNICK,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

20618

APPELLANT'S REPLY BRIEF

APPEAL FROM
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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The jurisdictional statement, statement of the case, specification of error and questions presented are incorporated herein as fully set forth in Appellant's Opening Brief.

REPLY TO APPELLEE'S PREFATORY REMARK

No one other than this Honorable Court can extend the scope of an appeal before it. The allegation of an erroneous extension of scope of this appeal is not founded in fact since the opening brief sets forth the appeal from orders denying withdrawal of a plea of guilty and expressly refers to the transcript, Volume 10, at Page 1157, under date of August 21, 1965.

The attempt by Appellee to relegate to footnotes the facts reflected in 700 pages of transcript leading up to the change of plea by Appellant Melnick deprives this Honorable Court of the opportunity of independent review and is as much a restriction of the scope of this appeal as Appellee's suggestion that Appellant is attempting arbitrarily to extend the scope; which is as aforesaid the function of this Honorable Court.

REPLY TO ARGUMENT A

Appellant agrees completely with the citation of the Edwards case as the law presently. The recitation in the oepning brief of the test is easily applied on the facts of the subject appeal. It is pointed out in the opening brief that there was a failure to set out what actions Appellant was pleading guilty to and why those acts constituted the crime of being guilty and primarily "What acts amount to being guilty of the charge."

Edwards v. United States, 256 Fed.2d 707 at 710

Therefore, it is respectfully submitted that the Appellee concurs in what tests should be applied and this Appellant respectfully submits that an application of that test will result in a determination by this Honorable Court that there was a failure to advise the Appellant of the acts which constituted a crime of conspiracy.

The Appellant respectfully contends that the syliogistic reasoning set forth by Appellee fails in that the oversimplification deletes the impact of co-defendant Osborne's fear of Appellant's testimony.

Appellant has indicated that the threats and violence relate to the matter of testimonial compulsion in that co-defendant Osborne, an attorney, knew of the right against self-incrimination in a criminal proceeding by defendant and that there would be no testimony against him if Appellant Melnick maintained his not guilty plea; however, after many days of trial, co-defendant Osborne determined that the change of plea by Appellant Melnick would not result in testimony and therefor he coerced Appellant Melnick into pleading guilty. The absence of testimony by Appellant Melnick is obvious.

We are in accord with the Appellee and their statements that reference to the Appellant's cases indicate that the determination of a motion to withdraw a plea of guilty is within the discretion of the Court. However, the argument advanced by Appellant is not at this juncture that of discretion, but that Appellant was misled. This is a matter for determination by this Honorable Court and if it is found that Appellant was misled, this is a separate and independent ground for reversal.

It is admitted that each appeal is distinguishable

on its fact from another. We must look to precedent for guidelines. Appellant has cited numerous cases relating to the concept of manifest injustice. It is not suggested that Pilkington v. United States, 315 Fed.2d 207 or any other is similar to the instant matter, nor has appellant asserted that the sentence was not clearly and concisely explained; rather, Appellant contends that he was misled.

REPLY TO ARGUMENT B

Appellant concurs that the determination of the application to withdraw plea is within the sound discretion of the trial court and that an assertion of innocence is not mandatory. However, the very issue in this appeal is whether the trial court did not exercise sound discretion

CONCLUSION

Therefore Appellant reiterates his prayer and respectfully requests that the order denying motion for withdrawal of plea of guilty be overturned.

Respectfully submitted,

GLADYS TOWLES ROOT
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By _____
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CERTIFICATE PURSUANT TO RULE 18(g) OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GLADYS TOMLES-ROOT